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REDACTED VERSION*

Matter of: Eastex Maritime, Inc.

File: B-256164

Date: May 19, 1994

J. Scott Hommer III, Esq., and Wm. Craig Dubishar, Esq., Venable, Baetjer, and Howard, for the protester.
Michael P. Davis, Esq., Shapiro, Fussell, Wedge, Smotherman & Martin, for Orange Personnel Services, an interested party.
Christopher A. Muessel, Esq., Maritime Administration, for the agency.
Christina H. Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency may not accept a front-loaded bid for layberth services where it was mathematically and materially unbalanced because the option year prices significantly declined from the base year bid prices, while the level of services required during each year of the contract remained constant, resulting in that mathematically unbalanced bid not becoming the lowest price to the government until the final month of a possible 5-year contract, thus creating doubt that the award will result in the lowest ultimate cost to the government.

DECISION

Eastex Maritime, Inc. protests the proposed award of a contract to Orange Personnel Services, Inc. by the Maritime Administration (MARAD) under invitation for bids (IFB) No. DTMA91-94-B-00007 for layberth services for two Ready Reserve Force vessels. Eastex contends that award to Orange would be improper because the bid submitted by Orange was materially unbalanced. We sustain the protest.

The solicitation was issued in December 1993 for layberth services for two C7-S-95A Roll-On/Roll-Off vessels within a specified geographic zone in the Beaumont, Houston, or

*The decision issued May 19, 1994, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

Galveston area of Texas. A "layberth" is a pier to which one or two ships may be moored and, in this context, maintained in a state of readiness to respond to military needs. The IFB contemplated the award of a firm, fixed-price contract that would include cost-reimbursement elements (not at issue here), for a base period of 1 year and four option periods of 1 year each. Award was to be made to the responsive, responsible bidder that had submitted the lowest aggregate evaluated price. The evaluated price was to include the prices for the base year and all of the option years, for both vessels.

The IFB incorporated by reference Federal Acquisition Regulation (FAR) clause 52.214-10 ("Contract Award-Sealed Bidding"), which provides for the rejection of materially unbalanced bids, stating that:

> "A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment."

The agency received nine bids by the bid opening date of December 21, 1993. When aggregate bid prices for the base and option years were compared (as required by the RFP), it was determined that USA Marine, Inc. (USAM) had submitted the low bid, Orange Personnel Service, Inc. (OPS) had submitted the second low bid, and Eastex had submitted the third and fourth low bids.[1] Before any contract was awarded, Eastex filed its protest, challenging the responsiveness of the low and second-low bids. However, MARAD found USAM to be nonresponsible and, since the firm was a small business concern, referred its nonresponsibility determination to the Small Business Administration (SBA) for review under its certificate of competency (COC) procedures. The SBA denied USAM's request for a COC. Since USAM is therefore not eligible for award in any case, we will not consider the responsiveness of its bid.

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[1]Eastex's lower-priced bid was based on the opportunity of using dredging equipment that was already in the vicinity of its proposed layberth site, whereas its higher-priced bid (for the same site) included mobilization costs that would be incurred if the contract was not awarded before the dredging equipment was moved.

The bid prices submitted by OPS and Eastex were as follows:

	OPS	EASTEX
Base Year	$1,016,000	$655,840
Option year 1	432,000	523,710
Option year 2	432,000	523,710
Option year 3	432,900[2]	524,864
Option year 4	432,000	523,710
Totals	$2,744,000	$2,751,834

Eastex contends that the bid submitted by OPS was nonresponsive because it was materially unbalanced. Specifically, Eastex alleges that OPS' pricing for its first year capital expenditures is overstated or front-loaded and that its operating expenditures are significantly understated in its option-year pricing. The protester points out that although OPS' total bid price for all 5 years of the contract was slightly lower than Eastex's total price, the alleged front-loading causes OPS' actual price to be high until the final month of the final option year. Thus, if the contract does not run its full term, including all 4 option years, the government would be paying a higher price for the layberth contract than it would if the contract were awarded to Eastex.

A mathematically unbalanced bid is one in which one or more contract line items carry more, and others less, than their proportionate share of cost, overhead, or profit. See D&G Contract Servs., 68 Comp. Gen. 277 (1989), 89-1 CPD ¶ 219.

Where essentially the same level of supplies or services is being provided in each performance period, a large price differential between the base and option periods, or between

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[2]This amount represents a correction that MARAD permitted OPS to make in its bid. The firm had originally bid the same amount for each option year, but later realized that the third option year would be a leap-year and thus would require an additional day's performance.

one option period and another, is prima facie evidence of mathematical unbalancing. Howell Constr., Inc., 66 Comp. Gen. 413 (1987), 87-1 CPD ¶ 455.

The determinative question in assessing mathematical unbalancing is whether the pricing structure is reasonably related to the actual costs to be incurred in each year of the contract. Residential Refuse Removal, Inc., 72 Comp. Gen. 68 (1992), 92-2 CPD ¶ 444. Specifically, as noted above, this inquiry concerns whether each contract line item (or each period of performance) carries its proportionate share of the cost of the work specified, as well as of overhead and profit. Howell Constr., Inc., supra. Where the bidder is able to point to legitimate cost-based reasons for the structure of its bid, higher prices in the earlier years of performance do not constitute enhanced prices. See, e.g., Cottrell Eng'g Corp., B-252891; B-252891.2, Aug. 2, 1993, 93-2 CPD ¶ 66. Where, however, the reasons offered do not demonstrate that the declining prices reflect declining costs, and one line item or period of performance bears significantly more, and another less, than its proportionate share of the cost, overhead, or profit, the bid is mathematically unbalanced. See, e.g., Residential Refuse Removal, Inc., supra (higher base-year costs not justified by expense of acquiring equipment required for performance where equipment could remain in useful service in the event of early termination); General Instrument Corp., B-228053, Dec. 8, 1987, 87-2 CPD ¶ 564 (mathematically unbalanced where overhead and profit are front-loaded).

In our view, the difference between OPS' base-year price of $1,016,000 and the base price of the next low bid ($655,840), as well as the difference between OPS' base price and its option-year prices ($432,000 for each year) was great enough to indicate the possibility of unbalancing and thus to require analysis of the presented costs. See, e.g., Fidelity Moving & Storage Co., B-222109.2, May 21, 1986, 86-1 CPD ¶ 476 (decline of more than 30 percent between base and option year prices required explanation). The possibility that any such unbalancing would be material (and thus require rejection) is strongly supported by the fact that OPS' price would not actually become low until the final month of a potential 60-month total term. We believe the agency was required to analyze whether OPS' bid was unbalanced in order to determine whether it was responsive, and that the determinative question is whether the pricing structure is reasonably related to the actual costs to be incurred in each year of the contract. See Residential Refuse Removal, Inc., supra.

At a hearing that was conducted by our Office, the protester presented cost figures to explain its bid structure, showing that OPS loaded essentially all of its start-up costs into the first year of performance. It is important to recognize that, whatever business reasons are offered to justify a particular bid, the government may not pay more for an item or service than its reasonable value. Westbrook Indus., Inc., 71 Comp. Gen. 139 (1992), 92-1 CPD ¶ 30. Thus, while start-up costs may be factored into a base period price so that a front-loaded base price does not automatically mean that the bid is unbalanced, the base period price may not carry a disproportionate share of the total contract price. Here, while the agency has argued that the services to be provided under this contract are different in the base and option years, we disagree. The service to be provided is the rental of the layberth site and provision of services as specified in the IFB. The fact that a vendor will have to perform some amount of work or modify a facility in order to perform the work required under the contract does not alter the nature or value of the actual services that will ultimately be provided. Thus, MARAD is not procuring dredging services or the installation of mooring devices in this case, but rather, is procuring the same services--the use of an appropriate layberth site--throughout the duration of the contract.

Except in cases where a contractor could have no use for equipment following contract performance, equipment and start-up costs are expected to be apportioned over the evaluated contract period, i.e., base and option periods together. Id. Thus, where a contractor acquires the equipment necessary to perform a service contract, which contract will require the same level of services in each of its years of performance, and front-loads those costs, we have not considered the bidder's business decisions for front-loading costs as relevant to the question of unbalanced bidding unless the unique nature of the contract or of the equipment will have little or no value and thus would leave the typical bidder with valueless equipment in the event of early termination. See Residential Refuse Removal, Inc., supra; Westbrook Indus., Inc., supra.

Here, statements were made by both OPS and MARAD at the hearing that support the strong expectation that the start-up costs that would be incurred under the first year of the contract would continue to provide benefits to the contractor for as long as 10 years. For example, when MARAD's berthing supervisor was questioned about some of OPS' first-year costs, he stated that "some bidders like to look at the long-term and put some extra costs into these berths because they are planning on using them past the 5-year length of the contract. They may not want to spend the money twice." Hearing Transcript (Tr.) at 365. OPS' president, when asked whether he expected to have any maintenance-dredging costs, responded that he did not; because he knew the berthing could go all 5 years, with a possibility it could rebid after 5 years, he only wanted to spend the money to dredge once, and "do something that's within reason that there should be very little maintenance during a possible full 10 years." Tr. at 224. He also stated:

> "I don't want to spend this kind of money without having some kind of way to assure that I would have the property for something maybe other than a MARAD layberth, and I wanted control of the property for 10 years, because that's the limit the Port can lease any property. Five years is all we have secured right now and we're still discussing the rest." Tr. at 226.

We think it is quite apparent that OPS' bidding structure would allow the contractor to shift any risks inherent in the possibility of early termination to the government, and to obtain the benefits of having its costs prepaid in this manner well past any termination. In addition, MARAD acknowledges this risk; its layberth supervisor stated at the hearing that "[t]he first year, we try and eliminate some of the risks for the contractors in that first year. We tell them that the first year is essentially guaranteed. If we pull the ship for any reason, they would at least recoup any costs that they have already spent . . . ." Tr. at 375.

When the contracting officer was questioned at the hearing about the agency's approach to determining whether a bid is unbalanced or not, he stated, "basically what I do on that is look for reasons of why those costs are there, and if there is a valid reason, I think that--for those costs being placed there, then that's the kind of thing that would satisfy me." Tr. at 446. He stated that he considered OPS' bid to be "legitimate," with its costs legitimately placed, by comparing its bidding structure to the previously awarded (defaulted) contract. Tr. at 447. It is apparent from the record that MARAD accepts the placement of virtually all of the start-up costs in the base year of the contract. We conclude, however, that the front-loading of these expenses results in a significant overstatement of the base-year price for the layberth rental, and option-year prices that are significantly less than cost.

At the hearing, OPS attempted to explain the structure of its bid by asserting the validity of the various cost estimates on which it had based its prices. It asserted that these figures were primarily derived from pricing information obtained from TLM Marine (under a prior contract for the same site). MARAD presented cost estimates that the agency had developed through discussions with OPS, without any independent verification. Eastex presented its own estimates (prepared with the assistance of a professional engineer) and written subcontractors' bids that had been prepared for TLM. While OPS attempted to justify its price on a cost-by-cost basis, we are not persuaded that the figures it presented provide a legitimate reason for the structure of its bid. For example, based on the hearing, we found that a number of OPS' estimates of its costs for upgrading its proposed layberth, such as dredging the layberth site, installing a mooring device to secure the vessels, and installing a number of bollards or mooring bitts, were each overstated in amounts ranging from [DELETED] to [DELETED]. In addition, OPS included a "contingency" amount of [DELETED] in its base-year costs to cover incidental expenditures, although it did not identify the contingencies it anticipated, nor did it include this category in its option-year pricing. The significance of the cumulative effect of these individual overstatements of cost is apparent in the large disparity between OPS' base-year bid and the protester's base-year bid and in the disparity between OPS' base-year price and its option-year price.

Similarly, we are persuaded that OPS' option-year pricing is based on understated cost figures. For example, OPS based its costs for the rental of the layberth on an oral understanding it alleges to have with the port director (who is not authorized to set the rental amount without approval of the Board of Commissioners for the port), even though it had a written rental quotation from the same director that was [DELETED] per year higher. In addition, OPS' option-year costs omitted any amounts for G&A, certain specified requirements such as trash removal, lighting, or portable toilets on the docks, legal or engineering expenses, contingencies such as the payment of an insurance deductible, or subcontracting costs for services which the firm proposed to subcontract out. Overall, OPS' price for the option years does not cover all of its option-year expenses, let alone any profit for those periods.

Accordingly, we conclude that OPS' bid is based on prices that are significantly less than cost for some work and prices that are significantly overstated in relation to cost for other work, and that it is therefore mathematically unbalanced.

Where there is reasonable doubt that acceptance of a mathematically unbalanced bid will result in the lowest ultimate cost to the government, the bid is materially unbalanced and cannot be accepted. Residential Refuse Removal, Inc., supra. In cases of extreme front-loading, where a bid does not become low until late in the term of a contract including option years, the bid is materially unbalanced on its face. Id. The bid should not be accepted because, despite the agency's initial intent to exercise the options, intervening events could cause the contract not to run its full term, resulting in inordinately high cost to the government and a windfall to the bidder. Westbrook Indus., Inc., supra.

Here, a comparison of OPS' bid with Eastex's low bid shows that OPS' bid would not become low until the final month of the final year of a possible 5-year contract.

MARAD asserts that it intends to exercise all of the option years under the contract and that therefore there is no doubt that OPS' bid represents the lowest ultimate cost to the government. Notwithstanding a contracting agency's intent to exercise all options, however, we recognize sufficient reason to doubt the low ultimate cost anticipated from a mathematically unbalanced bid where it does not become low until so very late in the contract term, including option years, because as the contract goes on, it becomes increasingly likely that intervening events could cause the contract not to run full term, resulting in a higher cost to the government than otherwise would occur if a balanced bid were accepted. Residential Refuse Removal, Inc., supra. Such intervening events relate not only to the agency's procurement plans to exercise all options, but also to the risk that future requirements could change, such that the options no longer reflect the government's actual requirements, or that termination for default may be necessary, before a front-loaded contract price actually provides the lowest ultimate cost to the government. Id. Here, where the layberthing requirement could be canceled at any time based on relocation of the vessels or other operations changes in the Ready Reserve Force, and where funding is available only on a 1-year basis, we think there is clearly doubt that OPS' bid will result in the lowest overall cost to the government. Accordingly, OPS' bid is materially unbalanced and, thus, unacceptable. Westbrook Indus., Inc. supra; Professional Waste Sys., Inc.; Tri-State Servs. of Texas, 67 Comp. Gen. 68 (1987), 87-2 CPD ¶ 477; Solon Automated Servs., Inc., B-206449.2, Dec. 20, 1982, 82-2 CPD ¶ 548. The bid should have been rejected as nonresponsive; we sustain the protest on this basis.[3]

[3]Because we are sustaining the protest on this basis, we need not consider whether any additional bases of protest that Eastex raised would also have been sustained.

We recommend that the agency award the contract to Eastex, if otherwise appropriate. We also find that Eastex is entitled to its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1993). Eastex should submit its certified claim for its protest costs directly to the agency within 60 working days of the receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Comptroller General
of the United States

B-256164

May 19, 1994

The Honorable Federico Peña
The Secretary of Transportation

Dear Mr. Secretary:

Enclosed is a copy of our decision of today sustaining the protest of Eastex Maritime, Inc. against the Maritime Administration's acceptance of a bid from Orange Personnel Services, Inc. under invitation for bids No. DTMA91-94-B-00007, which was issued by the Department of Transportation for layberth services for two Ready Reserve Force vessels.

We sustained the protest because Orange Personnel's bid was materially unbalanced. We recommend that the agency reject this firm's bid as nonresponsive and award the contract to Eastex, if otherwise appropriate. We also find that Eastex is entitled to its costs of filing and pursuing the protest, including reasonable attorneys' fees.

Since the enclosed decision contains a recommendation for corrective action, we direct your attention to 31 U.S.C. § 3554(e)(1) (1988), which requires that the head of the procuring activity is responsible for the solicitation report to our Office if the agency has not fully implemented our recommendations within 60 days of receipt of our decision. Please advise us, in any case, of the action taken on the recommendation.

Sincerely yours,

Comptroller General
of the United States

Enclosure